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Supreme Court of the United States

OCTOBER TERM, 1968, NO. 238

DAVID I. WELLS,

Appellant,

against

NELSON A. ROCKEFELLER, as Governor of the State of New York; LOUIS J. LEFKOWITZ, as Attorney General of the State of New York, JOHN P. LOMENZO, as Secretary of the State of New York, MALCOLM WILSON, as Lieutenant Governor of the State of New York, and Presiding Officer of the Senate of the State of New York, and ANTHONY J. TRAVIA, as Speaker and Presiding Officer of the Assembly of the State of New York,

Appellees.

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of this Court, the above-named appellees move to affirm the judgment appealed from on the ground that the questions presented by this appeal are so unsubstantial as not to require further argument.

Statement

The present action was instituted in June, 1966 challenging the constitutionality of New York's 1961 Congressional Districting Act (L. 1961, ch. 980) as being violative of Article I, § 2 and the Fourteenth Amendment to the Constitution of the United States.

In its opinion issued on May 10, 1967, the statutory three-judge Court noted that the congressional districts under the 1961 Act ranged from 15.1% above average to 14.4%

below average, with six districts containing a population of more than 10% above average and seven districts being over 10% below average. Accordingly, the District Court held that "[o]n the basis of population inequality alone, the [New York 1961 Congressional Districting] Act fails to meet constitutional standards." *Wells* v. *Rockefeller*, 273 F. Supp. 984, 989 (S.D.N.Y., 1967). In view of this conclusion, the Court did not deal with plaintiffs' other objections concerning alleged lack of compactness and so-called partisan gerrymandering, except to note that with respect to the latter point, no proof had been offered. *Id.* at 987.

In determining an appropriate remedy, the District Court acknowledged that it might be preferable to defer requiring new congressional districts until the 1970 census since:

> "Accuracy would call for a decree which would be based upon the 1970 census, knowledge of the number of congressional seats, and the immediate enactment in 1971 of a constitutional Act based upon the Supreme Court mandates, which Act would apply to the 1972 election of congressmen and which would retain jurisdiction in this court as a forum before which the litigants could press alleged failures to proceed. * * *" *Id.* at 991.

However, the District Court interpreted the decisions of this Court in *Swann* v. *Adams*, 383 U. S. 210, 385 U. S. 440, as precluding such an extension.

In attempting to resolve this dilemma, the District Court directed the New York Legislature to enact into law a new congressional districting plan, effective no later than March 1, 1968, but at the same time, suggested a "compromise" solution, in the following words:

> "* * * Acting upon the assumption that accurate congressional representation (1972-1982) must await the

1970 census and upon the Supreme Court's understandable objection to protracted delay, a compromise may be in order. The 1968 and 1970 (even possibly the 1972) congressional elections ought to be held in districts far more equalized than they are at present. There are enough changes which can be superimposed on the present districts to cure the most flagrant inequalities. * * *" *Id.* at 992.*

With this "solution" in mind, the 1968 Legislature drew new congressional districts for 29 of the State's 41 congressional seats. L. 1968, ch. 8. Since the Census Bureau advised State officials in the summer of 1967 that a new statewide census could not be completed before the fall of 1968 (R. 675-676)**, the Legislature was required to employ 1960 census figures as affording the only available statewide population figures. See Interim Report of the Joint Legislative Committee on Reapportionment, pp. 3-6; R. 576-578.***

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* The order of the District Court was affirmed, *per curiam* by this Court, Justice HARLAN dissenting, on Dec. 18, 1967. 389 U. S. 421. It should be noted that the District Court order prohibited the delineation of congressional districts upon considerations of race, sex or economic status, but did not contain a prohibition against any consideration of "politics" which plaintiffs had requested in the proposed order they submitted to the District Court. R. 304-306.

** References preceded by the letter "R" are to the pages of the original Record that has been transmitted to this Court.

*** In drawing the new congressional districts on the basis of the 1960 census figures, the Legislature was aware of Federal court decisions which rejected attempts to use speculative population figures based on projected population growth and which insisted that the 1960 census figures be employed. See *e.g., Maryland Citizens' Committee for Fair Congressional Redistricting, Inc.* v. *Tawes,* 253 F. Supp. 731, 734 (D. Md., 1966), *aff'd sub nom. Alton* v. *Tawes,* 384 U. S. 315; *Klahr* v. *Goddard,* 250 F. Supp. 537, 546 (D. Ariz., 1966); *Grills* v. *Branigin,* 284 F. Supp. 176, 180 (S. D. Ind., 1968).

After reviewing the new congressional districts established by chapter 8 and analysing the rationale of the congressional districting plan as contained in the Interim Report of the Joint Committee on Reapportionment, *supra*, and the Attorney General's brief and as expounded by statements to the Court by counsel for the Legislature, the Court concluded that the Legislature had produced a constitutionally valid plan that "at least until the next census, will give the voters an opportunity to vote in the 1968 and 1970 elections on a basis of population equality within reasonably comparable districts." 281 F. Supp. at 821, 826.

The objections to the new congressional districts raised by various intervenors concerning the division of certain neighborhoods in Brooklyn and The Bronx were rejected by the Court which found such divisions to be a necessary result of the creation of new congressional districts based on equal population. In overruling the objections of plaintiffs and objectants, the District Court noted that "no proof has been submitted that the Legislature acted in contravention of the precepts of the Supreme Court with respect to congressional reapportionment • • •". *Id.* at 825.

In its judgment entered on April 1, 1968, the District Court decreed that the congressional districting plan set forth in Chapter 8 of the Laws of 1968 was in compliance with its prior order of July 26, 1967 (which, *inter alia*, ordered that the drawing of new congressional districts not be based upon considerations of race, sex or economic status) and that Chapter 8 was in conformity with the requirements of the Constitution of the United States. R. 549-550. Plaintiff David I. Wells has appealed from this judgment. The other original plaintiff, Donald S. Harrington, who prosecuted this action both individually and as Chairman of the State Committee of the Liberal Party of the State of New York, has not joined in this appeal.

The Questions Presented By This Appeal Are Unsubstantial

A. *The decision of the District Court sustaining the constitutionality of New York's 1968 Congressional Redistricting Act is in conformity with the reapportionment decisions of this Court.*

In *Roman* v. *Sincock*, 377 U. S. 695, this Court advised (p. 710);

> "* * * the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination."

See also: *Reynolds* v. *Sims*, 377 U. S. 533, 579; *Swann* v. *Adams*, 385 U. S. 440, 444.

Mindful of the teachings of this Court, the Court below examined the Congressional Districting Plan established by Chapter 8 of the New York Laws of 1968 and found that it passed constitutional muster.

In its opinion below, the District Court found that the population disparities, which were the source of plaintiffs' original complaint and the basis of its prior opinion invalidating New York's 1961 Congressional Districting Act (273 F. Supp. 984) have been remedied by the enactment of the 1968 statute.

The former congressional districts established by the 1961 Act ranged from 15.1% above average in the largest district to 14.4% below average in the smallest district. Six of the former congressional districts had a population that

was more than 10% above average and seven districts had a population that was 10% below the average population per district in the State. Under the 1968 Congressional Redistricting Act, there is no Congressional district in the State containing a population in excess of 10% of the average population per district.

In Kings County (Brookyln), where the greatest population disparities were found in the 1961 Act, the Court below noted that "[a]lmost absolute equality has been contained for these seven districts, the range being from 417,040 to 417,478."

The minor population disparities under the 1968 statute were found by the District Court to rest upon rational considerations given by the Legislature to achieving equality of population throughout the State and within the natural geographic and economic regions within the State, the geographical conformation of the area to be districted, the maintenance of county integrity wherever possible, and the desire to avoid needless splitting of existing election districts in metropolitan areas which would require Boards of Election to change their enrollment books and to notify all registered voters of such changes. See Interim Report of the Legislative Committee On Reapportionment, R. 574-599; Testimony of counsel for the Legislature before the three judge Court, Steno. Minutes, Hearing of Mar. 12, 1968, pp. 22-71; R. 660-709.

Recognizing that the peculiar geographical contour of the State naturally divides into regions, the District Court found that it was rational for the Legislature to take these regions into account in establishing congressional districts so long as equality of population within the region and throughout the State remained the prime consideration, and so long as no discrimination had been shown.

For example, the Court found that it was logical in view of its population, interest, finances, charter, custom,

and history, to separate the City of New York from the rest of the State in establishing congressional districts. Since the 19 districts accorded New York City average 409, 109 per hypothetical district as against a State average of 409, 326, no charge of discrimination can be made, nor was made by any of the parties, with respect to such separation.

Since the area east of New York City contains only the Counties of Nassau and Suffolk, equality of population per district within this area required the establishment of five districts with populations ranging from 393, 585 to 393, 183.

In establishing congressional districts north of the New York City line, the Legislature adhered to county lines wherever possible. Westchester, a large county, was merged with adjacent Putman, a small county to produce two districts of 420, 146 and 420, 467, respectively. None of the other counties north of New York City have been divided in the creation of congressional districts except for Monroe and Erie Counties, whose populations of 586,387 and 1,064,688 respectively, were too large to prevent their division.

While no district can be regarded as the private preserve for any incumbent if it offends the equality of population principle, the Legislature also recognized that effective representative government dictates against needless changes in congressional constituancies.* Since, after the results of the 1970 census have been announced new congressional districts will, in all likelihood, have to be drawn in the State of New York in time for the 1972 elections, the Legislature had extra cause to maintain the congres-

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* In *Reynolds* v. *Sims*, 377 U. S. 533, 583, this Court recognized that "* * * Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, * * *".

sional districts in the area of the State with small disparities in population. As a result, the congressional districts in the western half of the State, where no district under the 1961 statute exceeded the State mean by more than 6.6%, were left intact in the new statute.

Despite the fact that these western districts were not criticized in the prior opinion of the District Court overturning the 1961 statute, appellant now argues that districts with smaller disparities should have been created in this area. Although smaller disparities from the State mean could have been established in that area by creating new districts, the existing districts rest upon rational State policies. For example, the 38th C. D. which contains the largest deviation from the State mean (-6.6%) consists of the small agrarian counties of Chautauqua, Cattaraugus, Allegany, Steuben and Schuyler in the southwest portion of the state. Appellant suggests merging that district with a portion of Erie County. However, whereas the people of Erie and Niagara Counties form part of the same standard metropolitan statistical area and are treated as a unit in various Federal and State projects, the population of the five aforementioned southwest counties have no common interest or link with the people in Erie County. See Interim Report, *supra*, pp. 15-16; Steno. Minutes, Hearing of March 12, 1968, pp. 51-54.

Appellant's attempt to redraw the northern districts by shifting Lewis County from the 31st to the 32nd Congressional District and Hamilton County from the 30th to the 31st Congressional District merely reflect his refusal to recognize the geographic and historic factors which were considered by the Legislature. Lewis County, which is located within the Adirondack Preserve, traditionally has been linked with the northern counties that fall within this geographically isolated area (the so-called "Blue Line Counties"). S.M., Hearing of March 12, 1968, pp. 56-57. To have linked this county southward with

Oneida County, as appellant suggests, would have produced the illogical result of merging an Adirondack County with the Mohawk Valley metropolitan area. Appellant's suggestion with respect to Hamilton County, which would remove it from the same district with Fulton County, overlooks the fact that because of its small population, Hamilton County has historically been united in government and interest with Fulton County and has even been required under the New York Constitution to share the same Assembly seat. N. Y. Const. Art. III, § 5.

Appellant's plan, which was drawn by a private citizen, contains a somewhat smaller maximum deviation among its congressional districts than the plan enacted by the Legislature (4.7% as compared to 6.6%). But this small discrepancy cannot outweigh the fact that the Legislature's plan was enacted by the elected representatives of the entire population of the State and contains congressional districts which the Court below found to be substantially equal in population while affording recognition to rational State policies based on geographic and historic considerations.

B. The 1968 Congressional Districts in New York compare favorably with other judicially sanctioned congressional districting plans.

It should be acknowledged that the new congressional district lines in New York, with a maximum population deviation of 6.6% from the State mean, compare favorably with congressional districting plans that have been judicially approved in other states.

In Illinois, a Federal Three-Judge Court working in conjunction with the Supreme Court of Illinois adopted its own plan for 24 congressional districts which range in population from 7.5% above average to 6.1% below average. *Kirby* v. *Illinois State Electoral Board,* 251 F. Supp. 908 (N. D. Ill., 1965); *People ex rel. Scott* v. *Kerner,* 33 Ill. 2d 460, 211 N. E. 2d 736.

In *Klahr* v. *Goddard*, 250 F. Supp. 537 (D. Ariz., 1966), a Federal Statutory Court also drew its own plan for three congressional districts which range in population from 5.18% above average to 6.64% below average.

In *Moore* v. *Moore*, 246 F. Supp. 578 (S. D. Ala., 1965), a Federal Statutory Court sustained a 1965 congressional districting act for eight congressional districts which ranged in population from 7.3% above average to 6.0% below average.

In *Kirk* v. *Gong*, 389 U. S. 574, this Court affirmed the judgment of a Florida District Court which had adopted a congressional districting plan whose largest district—based on 1960 census figures—is 8.78% above the State mean.

In overlooking these decisions, appellant places his principal reliance on the decision of the District Court in *Preisler* v. *Secretary of State of Missouri*, 279 F. Supp. 952 (W. D. Mo., 1967). However, the *Preisler* decision was based on considerations which are entirely inapposite to the situation in New York. The Missouri Federal Court, in invalidating the 1967 Congressional Districting Act, held that the districts created by that Act in rural areas were over-valuated in contrast to districts in metropolitan areas and that the Act particularly discriminated against the metropolitan area of St. Louis and Kansas City. *Id.* at 975. By contrast, no claim has been made, nor can be made, that the new congressional districts in New York discriminate against any metropolitan area. Moreover, the District Court in Missouri believed that the Legislature had decided that it could create minor deviations among districts under a so-called "de minimus" rule without having to present any rational considerations for such deviations.

The New York Legislature did not chose a 6.6% maximum deviation as a "safe tolerance" figure within which

districts could be created. It recognized, as this Court has pointed out:

> "• • • the fact that a 10% or 15% variation from the norm is approved in one State has little bearing on the validity of a similar variation in another State. 'What is marginally permissible in one State may be unsatisfactory in another, depending upon the particular circumstances of the case. *Reynolds* v. *Sims*, 377 U. S. 533, 578.' " *Swann* v. *Adams*, 385 U. S. 440, 445.

Rather, as described above, the present congressional districts in New York were the result of legislative determination to create congressional districts that were equal in population with minor disparities only where necessary to afford recognition to natural geographic regions and to the integrity of county and election district lines.

C. Appellant's claim of partisan gerrymandering presents a non-justiciable issue, and, in any event, is totally without merit.

In attempting to challenge the constitutionality of New York's 1968 Congressional Districting Act upon the ground of "partisan gerrymandering", appellant has raised a "non-justiciable issue" which Federal Courts consistently have refused to consider. See *e.g.*, *WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916, 925-926 (S.D.N.Y. 1965), aff'd. 382 U. S. 4; *Bush* v. *Martin*, 251 F. Supp. 484, 513 (S. D. Tex. 1966); *Sincock* v. *Gately*, 262 F. Supp. 739, 831-833 (D. Del. 1967); see also *Jones* v. *Falcey*, 48 N. J. 25, 222 A. 2nd 101, 105 (1966).

In *WMCA, Inc.* v. *Lomenzo*, this Court affirmed the judgment of the District Court which, in sustaining the constitutionality of a legislative plan (Plan A), had held that claims of partisan gerrymandering did not raise a Federal constitutional issue. In his concurring opinion,

MR. JUSTICE HARLAN observed (382 U. S. at 5-6):

> "In *WMCA, Inc.* v. *Lomenzo*, 238 F. Supp. 916 the three-judge Court found that Plan A satisfied this order; in so doing it rejected contentions that apportioning on a basis of *citizen* population violates the Federal Constitution, and that partisan 'gerrymandering' may be subject to federal constitutional attack under the Fourteenth Amendment. In affirming this decision, this Court necessarily affirms these two eminently correct principles."

In *Badgley* v. *Hare*, 385 U. S. 114, an appeal from the decision of the Supreme Court of Michigan (377 Mich. 396) contending that the apportionment scheme approved by that Court was based on political gerrymandering, was dismissed by this Court "for want of a substantial Federal question".

Even assuming, *arguendo*, that a claim of partisan gerrymandering presented a justiciable issue under the Federal Constitution, appellant failed to present such evidence before the District Court as would be required to sustain his burden of proof on this issue. *Cf. Wright* v. *Rockefeller*, 211 F. Supp. 460 (S.D.N.Y. 1963), aff'd 376 U. S. 52, reh. den. 376 U. S. 959; *Honeywood* v. *Rockefeller*, 214 F. Supp. 897 (E.D.N.Y. 1963), aff'd 376 U. S. 222. With respect to this issue, appellant's argument merely consisted of the charge that the non-rectangular shape of certain congressional districts, in and of itself, demonstrated that the New York Legislature was guilty of partisan gerrymandering in the enactment of Chapter 8 of the Laws of 1968. However, such an argument fails to come to grips with the actual meaning of a "gerrymander".

A "gerrymander" has been defined as:

> "* * * the abuse of power whereby the political party dominant at the time in a Legislature arranges con-

stituencies unequally so that its voting strength may count for as much as possible at elections and that of the other party or parties for as little as possible. To accomplish this design it masses the voters of the opposing parties in a small number of districts and so distributes its own voters that they can carry a large number of districts by small majorities", 6 *Encyclopaedia of the Social Sciences* 638 (1931).

Neither appellant, nor any other objectant below, demonstrated that there was any abuse of power in the enactment of Chapter 8 by the Legislature. In terms of political realties, since the New York Legislature is politically divided (with the Democratic Party controlling the Assembly and the Republican Party controlling the Senate), it would have been impossible for any redistricting bill to have passed both houses if it had been drawn to favor a political party. Instead, Chapter 8 received overwhelming bi-partisan support in pasing the Assembly by a vote of 126 to 19 and the Senate by a vote of 51 to 5. *N. Y. Times*, Feb. 27, 1968, p. 1.

In his Jurisdictional Statement, appellant attacks three congressional districts as examples of so-called "partisan gerrymandering". He contends that the new 23rd Congressional District in the Bronx and Manhattan was drawn "to make more difficult" the re-nomination of the incumbent Congressman, Jonathan Bingham. However, appellant does not point out that drawing districts that are equal in population necessarily required the division of at least one Bronx district with Manhattan since the population of the Bronx was insufficient to support four full congressional districts. The southwest extension of the 23rd District, which appellant criticizes, is an area that is linked to Manhattan by four bridges. As for making Congressman Bingham's renomination "more difficult", it is interesting to note that Congressman Bingham easily won renomination in the June 18th primary by a

vote of 27,699 to 13,685. *N. Y. Times,* June 20, 1968, p. 40.*

Appellant attacks the shape of the upstate 35th Congressional District which he describes as an "anomoly". Yet, there is nothing anomolous about this district which consists of eight agrarian counties (all of which are undivided) located in the lower Mohawk Valley. Again, it is interesting to note that appellant criticized this district when he testified as a witness on behalf of the plaintiff in *Honeywood* v. *Rockefeller, supra,* in 1962 contending that the district was drawn to insure the election of a Republican congressman. Yet, the Democratic Party has elected its candidate in each of the four elections that have taken place since this district was created.

Finally, appellant attacks the 6th Congressional District in Queens and argues that a statement offered to the Court by Donald Zimmerman, a spokesman for the majority leader of the Senate (and not appellee's counsel—as appellant erroneously describes him at page 14 of his Jurisdictional Statement) constitutes a concession that this district was drawn to provide a minority with some representation. If Mr. Zimmerman's statement is read in the full context of his remarks before the District Court, it will be seen that he was speaking hypothetically with reference to appellant's contention that the districts in Queens County had been gerrymandered since the Republican Party was expected to win in one of its four districts. In answer to this contention, Mr. Zimmerman had argued that he could see nothing improper if a party which received 43% of the total vote in a county is expected to capture one of its four congressional districts.

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* The particular portions of the 23rd Congressional District which were criticized as having been added to the District to insure Congressman Bingham's defeat in the primary (the 71st and 73rd Assembly Districts in Manhattan and the 76th and 82nd Assembly Districts in the Bronx) were carried by Congressman Bingham by a vote of 14,134 to 8,285.

There is nothing in Mr. Zimmerman's statement that is inconsistent with any decision of this Court. Indeed, it would appear to be supported by this Court's observation in *Fortson* v. *Dorsey*, 379 U. S. 433, 439, that a multi-member constituency apportionment scheme which operates to minimize or cancel out the voting strength of racial or political elements of the voting population might be unconstitutional. See also *Dixon, "Reapportionment Perspectives; What is Fair Representation"*, 51 Amer. Bar Ass'n J. 319 (1965). However, regardless of the merit of Mr. Zimmerman's contention, it cannot be attributed to the New York Legislature, whose statement of policy with respect to the drafting of the new congressional districts is set forth in the Interim Report of the Joint Legislature Committee on Reapportionment, *supra*.

In sum, appellant's contentions with respect to "partisan gerrymandering" amount to nothing more than undocumented charges resting upon pure conjecture. Appellant obviously would have preferred the adoption of his own districting plan. But, as the Court below correctly observed (281 F. Supp. at 825):

> "The Legislature cannot be expected to satisfy, by its redistricting action, the personal political ambitions or the district preferences of all of our citizens. For everyone on the wrong side of the line, there may well be his counterpart on the right side.
>
> * * *
>
> * * * Were each political party, and factions within each party, permitted to by-pass the Legislature by asking the courts to foist upon the electorate districts of their own draftsmanship and choosing, representative government would no longer exist. Self-interest would be substituted for majority rule. The courts cannot become pawns in such a political chess game."

CONCLUSION

For the foregoing reasons, the judgment appealed from should be affirmed.

Dated: New York, New York, July 23, 1968.

Respectfully submitted,

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